88-589

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MICHAEL SULLIVAN,

Petitioner,

v.

HARTFORD ACCIDENT & INDEMNITY COMPANY,

Respondent,

and

FORD CITY BANK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Does a federal district court, sitting in diversity, have ancillary jurisdiction to hear a third-party complaint brought by a defendant, where the third-party defendant is non-diverse, but the original and third party complaints are factually interdependent and involve precisely the same proof, and their resolution in a single proceeding will conserve judicial resources and prevent the potential for inconsistent verdicts?

2. Consistent with Rule 52 and prior decisions of this Court, including *Anderson v. Bessemer City*, 470 U.S. 564 (1985), and *Amadeo v. Zant*, 108 S. Ct. 1771 (1988), may a court of appeals substitute its own findings of fact for those made by an experienced trial judge who heard the evidence, observed the demeanor of the witnesses, and judged the credibility of testimony, when the trial judge's findings are amply supported by the trial evidence?

PARTIES TO THE PROCEEDING

Petitioner Michael Sullivan is an individual. Respondents Hartford Accident and Indemnity Company and Ford City Bank are corporations. In addition to the parties identified in the caption of this case, Bruce Beede, Richard Orlak, and William Quinn were parties to this case in the district court. They settled or defaulted prior to trial and were not involved in proceedings on appeal.

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Michael Sullivan respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (A-1)[1] is reported at 846 F.2d 377 (7th Cir. 1988). The memorandum opin-

[1] The district court's findings of fact and judgment, and the Seventh Circuit's slip opinion, judgment, and orders on rehearing, are found in the Appendix to this Petition and will be referred to as "A-____." The trial transcript will be referred to as "Tr."

ions of the United States District Court for the Northern District of Illinois (A-21) are not reported.

JURISDICTIONAL STATEMENT

The opinion and judgment of the Seventh Circuit were issued on April 28, 1988 (A-1). On May 12, 1988, the Seventh Circuit extended until June 2, 1988 the time in which to file a petition for rehearing (A-19). The petition for rehearing and suggestion of rehearing *en banc*, which was timely filed, was denied on July 6, 1988 (A. 20). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1986).

STATUTE INVOLVED

This case involves the doctrine of ancillary jurisdiction arising under 28 U.S.C. § 1332 (1986), which confers diversity jurisdiction upon the district courts. Section 1332, provides in relevant part that:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between–
>
> (1) citizens of different States;
>
> (2) citizens of a State and citizens or subjects of a foreign state;
>
> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or different States.

28 U.S.C. § 1332(a) (1986).

STATEMENT

Introduction

Petitioner Michael Sullivan, an attorney, alerted William Quinn, an officer of Ford City Bank, that Richard Orlak, Sullivan's sometime client, and Bruce Beede, another bank officer, might be involved in a substantial fraud against the bank (Tr. 306). After an extensive investigation, in which Sullivan provided substantial assistance to the bank, it was determined that Sullivan's suspicions were correct. In addition, it was determined that Quinn also was involved in the fraud (A. 46). Ultimately, the bank made a demand upon Hartford Accident & Indemnity Company, its insurer, to recover more than $1 million in losses which the bank sustained because of Orlak's conspiracy (A-43). Hartford eventually paid the bank's claim, and then brought suit against Sullivan, as well as Orlak, Beede, and Quinn (A-43-44). Orlak, Beede, and Quinn, all of whom had pleaded guilty to federal criminal charges arising out of the fraud, quickly defaulted or settled (A-22). Sullivan, who was not charged in the criminal matter, chose to defend the suit. After lengthy proceedings, including a trial, the district court rejected Hartford's claim against Sullivan, finding that Sullivan had not participated in the fraud that injured the bank (A-46). The district court also entered judgment in Sullivan's favor on a counterclaim he filed against the bank, which the court decided pursuant to its ancillary jurisdiction (A-47-51).

On appeal, the Seventh Circuit reversed (A-1). The court overruled the district court's factual finding that Sullivan was not a participant in the fraud, finding that he initiated the fraud by introducing Orlak to the bank several years earlier (A-11). In addition, the Seventh Circuit held that the district court lacked subject matter jurisdiction over Sullivan's third party complaint (A-9).

The Transactions At Issue

In 1970, Sullivan introduced Orlak, his then-client, to the bank (A-25-26). Orlak, who was seeking a $6,000 loan, had declared bankruptcy eight years earlier, a fact which Sullivan disclosed to the bank (Tr. 636). The bank made the loan, and between 1970 and 1972, it made additional loans to Orlak totalling more than $500,000 (A-26). Sullivan was not involved in the negotiation of these loans (*id.*).

In 1972, Orlak asked the bank to finance the development of a subdivision called "Neuport Estates." With the assistance of Beede and Quinn, Orlak obtained a $250,000 loan, which was later increased to $270,000. Sullivan was Orlak's partner in the Neuport Estates project (A-27). As a party to the Neuport Estates loan, Sullivan pledged his interest in the property to secure the loan (A-30).

Following the Neuport Estates loan, the bank made 20 additional loans to Orlak, totalling an additional $2.5 million, to develop other properties (A-33-37). As subsequent events revealed, these loans were obtained through the fraud of Beede and Quinn. The district court later found, in a finding which the Seventh Circuit did not address, that "Sullivan was never told of the[se] loans . . . nor did he have any part either in the application for or the approval of the[ ] loans" (A-33).

Sullivan eventually became aware of these loans, and he later discovered that Orlak had done nothing to develop the properties on which the loans had been granted. Sullivan, who was a shareholder in the bank, reported his findings to Quinn, and the two men immediately toured Orlak's properties to assess the extent of Orlak's defalcation. After the problems were disclosed to the bank's president, Sullivan met daily with bank officials to clear up the trail left by Orlak's fraudulent financial dealings (Tr. 32-33, 306, 308-09).

Sullivan, who was a party only to the Neuport Estates loan, subsequently assigned his interest in the Neuport Estates property to the bank, in lieu of foreclosure (A-41). Unlike Orlak's other development projects, Neuport Estates was profitable. Thus, after improving and paying off the indebtedness on the Neuport Estates property, the bank was left with a substantial surplus (A-50). Rather than return the surplus to Sullivan, the bank simply applied the surplus against Orlak's other loans, to which Sullivan was not a party (A-41).

District Court Proceedings

Hartford brought this action against Sullivan to recover the sums which it paid to the bank under its insurance policy.[2] Jurisdiction was based on diversity of citizenship (A-22). Sullivan subsequently filed a third party complaint against the bank, alleging that it had misapplied the proceeds of its sale of his interest in Neuport Estates by using the profits of the sale to recoup losses the bank suffered on loans to which Sullivan was not a party (*id.*).

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[2] Hartford also brought suit against Orlak, Beede, and Quinn, all of whom quickly defaulted or settled (A-22).

After hearing the testimony of Quinn, Sullivan, and various bank officials, the district court issued a lengthy and detailed opinion containing findings of fact and conclusions of law (A-21). The district court found that Orlak, Quinn, and Beede were engaged in a conspiracy to defraud the bank, which resulted in the losses for which Hartford had compensated the bank. However, the court specifically found that Sullivan was not a party to this conspiracy (A-46). In addition, the court found that it was not necessary to determine whether the Neuport Estates loan was legitimate because the bank (and Hartford) had sustained no loss from that loan, which could not therefore be the predicate for any recovery against Sullivan (A-47). Indeed, the bank had profited handsomely from the Neuport Estates loan (A-50).

The district court also entered judgment for Sullivan, in an amount later found to be $280,000, on his third-party complaint. The district court found that the bank had violated its state law fiduciary duty of loyalty to Sullivan by misapplying the proceeds of the Neuport Estates loan to Orlak's indebtedness, rather than returning the surplus to Sullivan (A-50). Hartford and Ford City appealed.

Proceedings on Appeal

In an opinion written by Judge Posner, the Seventh Circuit reversed (A-1-16). The court of appeals first held that the district court lacked jurisdiction over Sullivan's third party complaint. Analogizing the third-party action to a counterclaim, the court of appeals analyzed the jurisdictional issue by proceeding to decide whether Sullivan's claim should be considered compulsory or permissive (A-6). Although the Seventh Circuit found fault with its own analogy, recognizing that impleader is always voluntary, the court nonetheless concluded that jurisdiction should

be denied on the ground that the original and third party complaints arose out of different transactions or occurrences (A-7, 8, 9). The court of appeals also mounted a general attack on the doctrine of ancillary jurisdiction, noting that it is a "purely judge-made doctrine," and asserting that its justification is "rather tenuous" (A-9). Acknowledging that its holding was irreconcilable with this Court's statement in *Moor v. County of Alameda*, 411 U.S. 693, 714-15 (1973) (footnote omitted), that "the exercise of federal jurisdiction over claims against parties as to whom there exists no independent basis for federal jurisdiction finds substantial analogues in the . . . context of third party claims," the court of appeals expressed doubt that this Court's prior "suggestion was intended, and if it was, we respectfully disagree with it" (A-9). Finally, the court acknowledged that its holding—which clearly requires that parallel and related cases be maintained in federal and state courts—would create "hardship," but not "injustice" (A-6).

The court of appeals also reversed the judgment entered in Sullivan's favor on Hartford's complaint (A-11). In doing so, the court of appeals simply overruled the district court's factual finding that Sullivan was not a member of the conspiracy that injured the bank.[3] The court of appeals agreed with the district court that the question was whether there was a single conspiracy to defraud the bank, of which Sullivan was a part, or two conspiracies—

[3] In addition to exposing Sullivan to liability exceeding $1 million, the court referred Sullivan's conduct to the Illinois Attorney Registration and Disciplinary Commission for investigation (A-15). Moreover, the court expressed surprise that Sullivan had not been prosecuted for his involvement (A-15). In truth, Sullivan was investigated by federal prosecutors, but unlike Orlak, Beede, and Quinn, Sullivan was not charged.

one to defraud the bank through Orlak's post-Neuport Estates loans (to which Sullivan was not a party), and a second (whether legitimate or not) to obtain the Neuport Estates loan. However, unlike the district court, which found that there were two separate conspiracies (in one of which Sullivan clearly was not involved), the court of appeals found that there was only one global conspiracy, and that Sullivan participated in it (A-11). The court of appeals tied Sullivan to the conspiracy because Sullivan (a) had introduced Orlak to the bank in 1970 (A-11, 12), and (b) allegedly had profited, through legal fees earned in connection with real estate closings, and through Orlak's continued borrowings (A-12, 13). Although the court of appeals made central findings of fact that were directly contrary to those contained in the district court's painstaking account of the evidence, it simply ignored those findings in preference to its own.

On July 6, 1988, the Seventh Circuit denied Sullivan's petition for rehearing and suggestion of rehearing *en banc* (A-20).

REASONS FOR GRANTING THE WRIT

The Seventh Circuit's decision, which severely constricts the ancillary jurisdiction of the district courts, and requires the filing of multiplicitous litigation to resolve closely related claims, conflicts with prior decisions of this Court and with decisions of other courts of appeals. Because of the conflict of authority on this point, the wasteful deployment of judicial resources mandated by the Seventh Circuit's decision, and the possibility of inconsistent results which will flow from the multiplicitous pro-

ceedings required by the Seventh Circuit's rule, further review is warranted.

By disregarding, without explanation, the district court's detailed factual findings, and by substituting its own factual findings for those of the experienced trial judge who heard the evidence and observed the demeanor of the witnesses, the court of appeals cavalierly disregarded the limits placed upon it by Federal Rule of Civil Procedure 52(a), and so far departed from the accepted and usual course of judicial proceedings as to require that this Court exercise its supervisory power.

I.

THE SEVENTH CIRCUIT'S DETERMINATION THAT THE DISTRICT COURT LACKED JURISDICTION OVER SULLIVAN'S THIRD PARTY CLAIM IGNORES SETTLED LAW AND CREATES A CONFLICT AMONG THE CIRCUITS.

The Seventh Circuit ruled that the district court lacked subject matter jurisdiction over Sullivan's successful third party claim because Sullivan and the bank were both Illinois citizens, and thus non-diverse. Noting that the original and third-party complaints involved "considerable factual overlap," but not the "same transaction or occurrence," a concept to which the court gave an extremely narrow construction, the Seventh Circuit held that the district court lacked jurisdiction over Sullivan's third-party complaint (A-9). That holding conflicts with prior decisions, both of this Court and of other courts of appeals, and it disregards the sound policy grounds supporting the exercise of ancillary jurisdiction.

1. The Seventh Circuit's cramped view of ancillary jurisdiction conflicts with the case law of other circuits. Indeed, it is hornbook law that a district court may exer-

cise ancillary jurisdiction over a non-diverse impleaded party ty on a related claim. 3 J. Moore, *Moore's Federal Practice* ¶ 14.26 at 14-108 (1987); 13 C. Wright, A. Miller, E. Cooper, *Federal Practice and Procedure* § 3523 at 109-12 (2d ed. 1984); 6 C. Wright & A. Miller, *Federal Practice and Procedure* § 1444 at 223 (1971).

The decision at bar directly conflicts with the Fifth Circuit's decision in *Rogers v. Aetna Casualty and Surety Co.*, 601 F.2d 840, 843 & n.4 (5th Cir. 1979). In that case, plaintiff Rogers sued Aetna in diversity, claiming that Aetna wrongfully denied coverage for an insurance loss. After denying coverage, Aetna filed a third-party complaint against two defendants whose negligence Aetna blamed for the loss. Under the Seventh Circuit's holding, Aetna's third-party complaint was not compulsory, because it involved a transaction different from that involved in Rogers' breach of contract action. (After all, Aetna's liability in contract did not turn on the third parties' liability in tort, which could be prosecuted in state court.) Nonetheless, the Fifth Circuit held that the district court had ancillary jurisdiction to "adjudicate . . . a related claim based wholly upon state law asserted by the defendant against a non-diverse impleaded third-party defendant." *Id.* at 843 n.4. *See also H.L. Peterson Company v. Applewhite*, 383 F.2d 430, 433 (5th Cir. 1967).

The Seventh Circuit's decision also conflicts with the decisions of other circuits. In *Saalfrank v. O'Daniel*, 533 F.2d 325, 329 (3d Cir.), *cert. denied*, 429 U.S. 922 (1976), for example, the Third Circuit held that where diversity exists between plaintiff and defendant, there need not be any independent jurisdictional basis to hear the defendant's claims against a third-party defendant, against whom the plaintiff seeks no relief. *Saalfrank* prohibits the exercise of ancillary jurisdiction with respect to a *plain-*

tiff's claim against a non-diverse third party (*accord Owen Equipment & Erection Co.*, 437 U.S. 365, 377 (1978)), but recognizes that ancillary jurisdiction is proper where, as here, only the *defendant* pursues a claim against the third party. *See also Field v. Volkswagenwerk AG*, 626 F.2d 293, 298-99 (3rd Cir. 1980).

2. The Seventh Circuit's narrow view of ancillary jurisdiction is also contrary to this Court's decision in *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978). In *Owen Equipment*, this Court identified two requirements for the exercise of ancillary jurisdiction. First, the third-party action must have "logical dependence" upon the action-in-chief. Second, parties who have been "haled into court" against their will should be accorded latitude in bringing ancillary claims. (*Id.* at 376.) Both requirements are satisfied here.

First, Sullivan's third party claim is logically dependent upon the underlying diversity action. A finding that Sullivan was not liable to Hartford was critical to Sullivan's claim that the bank had breached its fiduciary duty to him when it misapplied the surplus proceeds of his Neuport Estates loan to pay Orlak's unrelated debts. Likewise, a judgment that Sullivan was liable to Hartford would have undermined Sullivan's claim for recovery, and any such judgment would have required reduction by the amount of the profit earned from the bank's sale of Sullivan's interest in Neuport Estates. Thus, the resolution of the third party complaint is logically dependent on the original complaint.[4]

[4] The original and third party complaints also were factually related. Hartford complained of Sullivan's complicity in an alleged fraud. Sullivan denied his involvement in the fraud and complained that the bank had appropriated his property, in violation of the bank's fiduciary duty to him, as part of the bank's effort to recoup its losses on the same scheme.

Requiring the litigation of these interdependent issues in separate forums could well result in inconsistent verdicts. For example, the federal district court could find (as it did) that Sullivan was not a party to the fraud, while the state court might have found, in an independent action, that Sullivan had participated in the fraud, and, thus, was not entitled to recover for breach of fiduciary duty. This case therefore illustrates the policy justification for ancillary jurisdiction which this Court noted in *Owen Equipment*—the need to avoid relitigating the same issue in separate cases. (437 U.S. at 377.) In addition, the possible benefits of collateral estoppel might cause one party to delay the proceedings in one case to achieve the collateral estoppel benefits of a judgment in the other case.[5]

Second, this Court noted in *Owen Equipment* that ancillary jurisdiction should be understood as a doctrine which typically protects parties haled into court against their will. (437 U.S. at 376.) Sullivan, as a defendant in the original action brought by Hartford, was haled into the federal court against his will to defend a diversity action involving only state law claims. The Seventh Circuit held, however, that Sullivan cannot pursue his counterclaim, which arose out of the same events and was found meritorious by the federal district court, unless he is willing to endure the expense of maintaining a parallel

[5] While the court of appeals addressed issues relating to *res judicata* (A-8), it did not address the injustice which collateral estoppel could cause under its view of the law. A finding in the Hartford case that Sullivan was not a part of the fraud would not bind the bank in subsequent litigation. On the other hand, a finding that Sullivan was a part of the fraud could have preclusive effect on Sullivan in subsequent litigation. Thus, the Seventh Circuit's formulation requires Sullivan to prevail on the same issue in two logically interdependent suits, in two separate forums, while a single ruling adverse to Sullivan in either forum can be preclusive.

action in the state courts. Thus, under the Seventh Circuit's formulation, diversity jurisdiction not only grants a federal forum to the foreign citizen, but denies the local resident the opportunity to try all related actions in a single case.

The Seventh Circuit's decision is therefore inconsistent with this Court's analysis in *Owen Equipment*, a case which the Seventh Circuit did not even acknowledge.

3. The decision below also ignores the public policy considerations which support the exercise of ancillary jurisdiction. As this Court has held, "Congress did not intend to confine the jurisdiction of the federal courts so inflexibly that they are unable to protect legal rights or effectively to resolve an entire, logically entwined lawsuit." *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 377 (1978). On the other hand, the Seventh Circuit conceded that its narrow view of ancillary jurisdiction, which requires the initiation of "parallel . . . lawsuits," would cause "hardship," no doubt to the judiciary as well as to the parties (A-6). Indeed, because the single issue of Sullivan's role in the transactions admittedly will have to be tried twice under the Seventh Circuit's formulation, the holding below clearly requires wasteful relitigation of the same "logically entwined lawsuit."

The kind of waste mandated by the Seventh Circuit's decision is well demonstrated by the substantial overlap in proof between the original and third party complaints in this case. Evidence showing that Sullivan was not a party to the fraud, which was critical to Sullivan's defense against the Hartford claim, also supported Sullivan's claim against the bank, and vice versa. Indeed, the bank conceded at trial that the two complaints were related, noting that "a great deal of [the bank's] evidence will duck-tail [sic] with" Hartford's (Opening St. Tr. 5). In fact, the bank

presented no witnesses, relying entirely upon those called by Hartford. In this case, therefore, the original and third-party complaints involved precisely the same issues and proof.

In sum, the Seventh Circuit's decision presents an issue critical to the administration of justice in the federal courts. Unless corrected, the Seventh Circuit's decision will require the wasteful relitigation of interdependent lawsuits, and, due to the doctrine of collateral estoppel, will permit one party to a controversy, but not both, to relitigate contested factual issues. Moreover, the Seventh Circuit's decision is contrary to the decisions of other courts of appeals, to this Court's decision in *Owen Equipment*, and to the principles of judicial economy underlying the doctrine of ancillary jurisdiction. For all of these reasons, this case warrants further review.

II.

BY SUBSTITUTING ITS FACTUAL FINDINGS FOR THOSE OF THE DISTRICT COURT, THE SEVENTH CIRCUIT DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

The central issue at trial, as the Seventh Circuit correctly noted, was "whether there were two conspiracies—one centering on the loan for Neuport Estates, the other on the loans to Orlak—or one giant conspiracy to defraud the bank, with the loan to Neuport Estates just one component of it" (A-11). The district court found that there were two "conspiracies": (1) the Neuport Estates transaction, which may well have been a legitimate transaction, and to which Sullivan was a party, and (2) a broader unlawful conspiracy, in which Sullivan was not involved (A-46-47). The Seventh Circuit, without a single citation to the record, simply rejected these findings, and found

that a single conspiracy existed (A-11). Because the Seventh Circuit's decision constitutes a substantial departure from the usual and accepted course of judicial proceedings, and is contrary to the limits imposed by Rule 52(a), this case warrants further review.

1. The Seventh Circuit correctly noted that Sullivan's role presented a question of fact (A-13). Thus, the district court's finding that Sullivan was not a member of Orlak's larger conspiracy could be set aside only if it was "clearly erroneous." Fed. R. Civ. P. 52(a).[6] In the case at bar, however, the court of appeals did not hold that the district court's findings of fact were clearly erroneous. The court of appeals simply ignored those findings and substituted its own findings of fact in their place and stead. The court of appeals not only trampled on the proper functions of the district court, in violation of Rule 52(a), but created findings for which there is no support in the record.

2. Unlike the district court, the Seventh Circuit made a "finding" that Sullivan was involved in a fraudulent scheme prior to the 1972 Neuport Estates loan. The court of appeals supported this finding with two supposed "facts": (a) Sullivan assisted Orlak's initial "fraudulent"

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[6] It is settled law that an appellate court must credit factual findings if they are "plausible in light of the record viewed in its entirety," and it cannot disregard those findings "simply because it is convinced that it would have decided the case differently." *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985). It is not the province of an appellate court to retry the evidence or to draw different inferences from the facts. *Id.* at 574-75. The trial judge, of course, is uniquely situated to judge the credibility of witnesses, and findings based on credibility determinations "can virtually never be clear error." *Id.* at 575; *Amadeo v. Zant*, 108 S. Ct. 1771, 1778 (1988); *United States v. Friedman*, 739 F.2d 252, 255 (7th Cir. 1984). Finally, a party's testimony is itself sufficient to meet the requirement that a judgment be based upon substantial evidence. *Christmas v. Sanders*, 759 F.2d 1284, 1289 (7th Cir. 1975).

$6,000 loan by recommending Orlak to the bank in 1970, without disclosing Orlak's 1962 bankruptcy (A-11, 12); and (b) Sullivan was "aware" of Ford City's pre-Neuport Estates loans to Orlak (A-2). It is the Seventh Circuit's findings, rather than those of the district court, that are clearly erroneous.

The court of appeals' assertion (A-11) that Sullivan recommended Orlak "to [bank officer] Quinn without disclosing Orlak's previous bankruptcy" is both central to the Seventh Circuit's holding and directly contrary to the record evidence. Sullivan testified that he disclosed Orlak's 1962 bankruptcy when he introduced Orlak to the bank in 1970 (Tr. 636). Not only was that fact corroborated by Quinn, who testified that Orlak's bankruptcy was noted in the bank's credit files (Tr. 96), but there was *no* contrary evidence on the point. Thus, the Seventh Circuit's central assertions (A-11, 12)—that "Sullivan . . . launched what turned out to be a continuing scheme for defrauding the bank," "was instrumental" in the creation of the fraud, and "was directly involved in two fraudulent loans"—are simply false. Uncontroverted evidence showed that Sullivan disclosed, and the bank was aware of, Orlak's 1962 bankruptcy.[7]

The court's second shred of evidence linking Sullivan to the scheme to defraud was his purported "awareness"

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[7] Moreover, even if the court of appeals were correct in its assertion that Sullivan had failed to disclose Orlak's prior bankruptcy, the district court, as the finder of fact, was not required to infer from this "fact" that Sullivan committed fraud. It was Orlak who misrepresented his prior financial history (albeit unsuccessfully, because of Sullivan's disclosure), and there is no evidence that Sullivan even knew of Orlak's attempt to mislead the bank. Moreover, it was the duty of the bank, not Sullivan, to investigate Orlak's credit history before extending over $3 million in credit.

of Ford City's loans to Orlak from 1970 to 1972. The Seventh Circuit acknowledged that Sullivan was *not* involved in the negotiation of these loans, but the court observed that Sullivan, as Orlak's lawyer, "was aware of them" (A-2, 12).[8] The Seventh Circuit did not question the district court's finding that "Orlak personally applied to the bank for these loans; Sullivan neither recommended them nor had any part in their being applied for or processed at the bank" (A-26). Moreover, the trial evidence showed that Sullivan believed that Orlak obtained these additional loans legitimately; Orlak had partners (not including Sullivan) in these projects (Tr. 718).

The district court's finding—that Sullivan was not a member of Orlak's conspiracy—is certainly not an impermissible inference to be drawn from the existence of these loans and Sullivan's lack of participation in them. Thus, the contrary inference drawn by the Seventh Circuit—that Sullivan "launched" the scheme to defraud in 1970—was not the only reasonable inference to be drawn, and the trial court's refusal to draw it, in light of all the evidence and the trial court's ability to evaluate the credibility of the witnesses, was not "clearly erroneous."

3. After the Neuport Estates loan, Ford City approved 20 additional loans to Orlak. The district court found, in a finding that the court of appeals did not dispute, that "Sullivan was never told of the loans . . . nor did he have any part either in the application for or the approval of

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[8] The Seventh Circuit opinion does not explain how Sullivan learned of these loans. He learned of some by accident: "[i]n one transaction in 1972, for example, Sullivan sold a piece of property to Orlak and Ford City Bank provided the financing" (A-26). The district court found Sullivan learned of other loans, not as a co-conspirator, but "in his capacity as Orlak's lawyer" (*id.*).

these loans" (A-33). These loans, for $2,524,847.50 in principal (A-37), were the major source of the bank's losses to Orlak. Only by finding (contrary to the findings made by the trial judge) that Sullivan remained part of the conspiracy could the court of appeals hold Sullivan liable for these losses. The court provided the connection with the following "clear and convincing evidence": (a) Sullivan knew of "fraudulent loans" which were used to pay interest on the Neuport Estate loan (A-12); (b) he did not "blow the whistle" on Orlak (A-13), and (c) he benefitted from the loans (A-12). This "evidence" is no more substantial than was the "evidence" of Sullivan's "launching the fraud."

The court of appeals stated that Sullivan knew that Orlak continued to obtain "fraudulent" loans, using some of the money to pay interest on the Neuport Estates loan (A-12). As subsequent events revealed, the loans were fraudulent. However, there was *no* evidence to show that Sullivan knew the loans were fraudulent at the time that they were made. Indeed, there was *no* evidence to show that Sullivan even knew about the loans until long after they had been made. While Sullivan later became aware of some of the loans, the essence of a civil conspiracy, as the court of appeals correctly noted (A-10), is agreement, not awareness. *See United States v. Borelli*, 336 F.2d 376, 384 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965). The trial evidence showed no agreement between Orlak and Sullivan to obtain money by false pretenses; at most, the evidence showed that Sullivan knew about the loans after the fact. Moreover, as to the application of these loan proceeds to the Neuport Estates project, Sullivan testified that he promised to reimburse Orlak for any advances which Orlak might make to Neuport Estates (Sullivan Dep. 246). Other evidence, which the Seventh Circuit completely disregarded, also showed that Sullivan

was not a party to the post-Neuport Estates fraud. For example, the evidence showed that Sullivan, when he discovered Orlak's problems on other projects, told him to solve them (Tr. 286-87), and that Sullivan inquired of Orlak concerning the payment of interest on the Neuport Estates loan (Tr. 300).

The court of appeals also supported its "finding" by asserting that Sullivan "did not blow the whistle" (A-13). In fact, however, it was Sullivan—and no one else—who "blew the whistle" on Orlak by telling bank officer Quinn about the irregularities involving Beede and Orlak (Tr. 32-33, 306), by touring Orlak's developments with Quinn to discover the extent of the scheme (*id.*), and by meeting on a daily basis with bank officials in an attempt to uncover the extent of the fraud and solve the problems created by Orlak (*id.* at 308-09).[9]

Finally, the court of appeals' assertion (A-12) that Sullivan benefitted from Orlak's "enlarged . . . demand" for his legal services is pure speculation. There is no evidence to show that Sullivan knowingly aided the conspirators or even knew of Orlak's activities on the post-Neuport Estates loans. Nor is there any evidence to show that Sullivan "enlarged" the "demand" for his services. The evidence shows that Sullivan assisted Orlak only at occasional real estate closings; he did not participate in any other way.

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[9] The Seventh Circuit indicated that it was troubled by the fact that Sullivan owned stock in the bank (A-13). That fact is indeed troubling, but for reasons other than those mentioned by the court of appeals. Not only was Sullivan a stockholder, but he invested an additional $28,000 in bank stock only five months before he discovered—and disclosed—Orlak's fraud (Tr. 659). Had he been involved in the fraud, he certainly would not have invested his money in a bank that faced a certain loss of over $1 million because of Orlak's fraud.

4. In sum, the evidence does not compel the inference that Sullivan joined Orlak's conspiracy after the Neuport Estates loan, and the district court's finding that Sullivan was not part of the fraud, which is supported by substantial evidence, is not clearly erroneous. As Hartford's counsel conceded at trial, the issue of Sullivan's participation in the larger conspiracy turned largely on questions of credibility (Tr. 577). The experienced trial judge, having to choose in some instances between the credibility of Quinn and Sullivan (Tr. 348), actively participated in the questioning of both witnesses (*see, e.g.*, Tr. 341-49, 781-87), and ultimately found Sullivan more credible than Quinn, who had been convicted of a felony (Tr. 2). It was up to the trial judge, and not the court of appeals, to make this choice.

The Seventh Circuit's treatment of the trial evidence well demonstrates the wisdom of the rule prohibiting appellate courts from retrying cases on appeal. Indeed, the Seventh Circuit's "factual findings" have exposed Sullivan, whose demeanor and credibility it has never observed, to potentially devastating civil liability, as well as the possible loss of his professional license. The district court's contrary findings of fact are not "clearly erroneous," and, by disregarding them, the court of appeals departed from the accepted and usual course of judicial proceedings. For this reason as well, this case warrants further review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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